SEP 20 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 362

CHARLES COOPER,

Petitioner,

vs.

STATE OF MARYLAND,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

JOSEPH LOEFFLER,
Attorney for Petitioner.

BERNARD J. FLYNN,
HARRY E. GOERTZ,
Of Counsel.

The Daily Record Co., Baltimore 3, Md.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner, Charles Cooper, respectfully prays that a Writ of Certiorari be issued out of and under the Seal of this Court to review the decision of the Court of Appeals of Maryland, affirming the judgment and sentence of the Criminal Court of Baltimore City, sitting without a jury.

OPINIONS OF THE COURT OF APPEALS OF MARYLAND AND OF THE CRIMINAL COURT OF BALTIMORE CITY

The Court of Appeals of Maryland rendered its opinion on June 25, 1954, and is reported in 106 A. 2d at page 129

(R. p. 74; App. p. 15), and the opinion of the Criminal Court of Baltimore City, adjudging the Petitioner guilty, was rendered on October 29, 1953 (unreported) (R. p. 70).

JURISDICTION

The Petitioner contends that he was deprived of due process of law (a) when the Criminal Court of Baltimore City admitted into evidence, in his case, testimony of a police officer who testified in a prior case, but whom the Court did not remember testifying and whose evidence was not read to the Court by the Reporter, nor did the Court familiarize himself with it before entering a verdict of guilty; and the Court of Appeals, in its opinion, having ignored this objection of your Petitioner; and (b) when the Court of Appeals failed to consider undisputed facts of great and decisive importance bearing upon the admissibility of the alleged oral confession of your Petitioner, without which the verdict could not have been sustained.

On October 29, 1953, the Petitioner was found guilty under the fourth count of the indictment and acquitted with respect to the other counts of the indictment (R. p. 5), and on June 25, 1954, the Court of Appeals of Maryland affirmed the judgment below.

On July 26, 1954, the Court of Appeals of Maryland denied the Petitioner's motion for a reargument upon the constitutional grounds presently invoked (App. p. 21), and on the 26th day of July, 1954 (R. p. 93; App. p. 24), and on the 24th day of August, 1954 (R. p. 93; App. p. 24), the Court of Appeals passed orders staying the mandate finally for a further period of thirty days from the 25th day of August, 1954, pending the filing of this Petition to the Supreme Court of the United States; and providing also that the issuance of said mandate be further stayed and continued

until the decision of the Supreme Court of the United States upon said Petition for said Writ, is rendered (R. p. 93).

The jurisdiction of the Supreme Court to review the decision and judgment is conferred by Title 28, U.S.C.A. 1257(3).

QUESTIONS INVOLVED

I. The Criminal Court of Baltimore City deprived the Petitioner of due process when the Court entered up judgment in this case without first having read, or had read to him by the Reporter, the testimony of Officer Markowitz.

II. The Court of Appeals of Maryland deprived the Petitioner of due process when, in its opinion, the Court failed to consider undisputed facts of great and decisive importance bearing upon the admissibility of the alleged oral confession attributed to the Petitioner.

CONSTITUTIONAL PROVISION

"* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *." U.S.C.A. "Constitution" Amend. 14, Sec. 1.

The Petitioner, in the first count of the indictment, was charged with committing, on July 20, 1953, a violent and felonious assault upon one Patricia Swiec and that he forcibly and against her will feloniously ravished and carnally knew her; in the second count, he was charged with an intent to commit the same crime as set forth in the first count; in the third count, he was charged with feloniously making an assault upon the said Patricia Swiec, a woman child under the age of fourteen years and then and there feloniously did carnally know and abuse her; in the fourth count, he was charged with feloniously making an assault upon the said Patricia Swiec, a woman child under the

age of fourteen years, and did then and there beat, with intent, feloniously to carnally know and abuse her; in the fifth count, he was charged with unlawfully making an assault upon the said Patricia Swiec and did then and there beat her; and finally, in the sixth count, he was charged with unlawfully attempting feloniously to carnally know and abuse said Patricia Swiec, who was then and there a woman child under the age of fourteen years (R. p. 6).

The Petitioner, at the time of the alleged occurrences, was eighteen years of age and the offenses, except that charged in count 5, carried capital punishment.

> "Every person convicted of the crime of rape or as being accessory thereto before the fact shall, at the discretion of the Court, suffer death, or be sentenced to confinement in the Penitentiary for the period of his natural life, or undergo a confinement in the Penitentiary for not less than eighteen months nor more than twenty-one years, and penetration shall be evidence of rape, without proof of emission."
>
> Annotated Code of Md. (1951), Art. 27, Sec. 557.

> "Every person convicted of the crime of an assault with intent to have carnal knowledge of a female child under the age of 14 years, or with intent to rob shall be guilty of a felony and shall be sentenced to confinement in the Maryland Penitentiary for not less than two years or more than ten years; every person convicted of the crime of an assault with intent to murder shall be guilty of a felony and shall be sentenced to confinement in the Maryland Penitentiary for not less than two years nor more than fifteen years; and every person convicted of the crime of an assault with intent to commit a rape shall be guilty of a felony and shall be punished with death, or, in the discretion of the Court, he shall be sentenced to confinement in the Penitentiary for the period of his natural life, or he shall be sentenced to confinement in the Penitentiary for not less than two years nor more than twenty years; pro-

vided, however, that the jury before whom any person indicted for the crime of an assault with intent to commit a rape shall be tried, if they find such person guilty thereof, may add to their verdict the words 'without capital punishment', in which case the sentence of the court shall not exceed twenty years in the Penitentiary, and in no case where a jury shall have rendered a verdict in manner and form as hereinbefore prescribed, 'without capital punishment', shall the court in imposing the sentence, sentence the convicted party to pay the death penalty or to be confined for more than twenty years in the Penitentiary. * * *."

Annotated Code of Md. (1951), Art. 27, Sec. 14.

"If any person shall carnally know and abuse any woman child under the age of fourteen years, or knowingly carnally know and abuse any woman who is an imbecile, non compos mentis or insane, of any age whatever, every such carnal knowledge shall be deemed felony, and the offender being convicted thereof shall at the discretion of the court suffer death or imprisonment for life in the penitentiary, or for a definite period, not less than eighteen months nor more than twenty-one years."

Annotated Code of Md. (1951), Art. 27, Sec. 558.

The Petitioner, in his sworn testimony, denied the commission of the offenses with which he was charged, and in the absence of the purported oral confession, hereinafter adverted to, the Court of Appeals said that the verdict could not be sustained (R. p. 78; App. p. 18).

At the trial in the lower court, Patricia Swiec testified that the alleged offenses were committed by the boy who was in the car when the police officers, Harry A. Thomas and Edward Markowitz, arrived in an automobile. Officer Markowitz testified, in a prior case, that he got out of his automobile and with a flashlight, peered into the automobile, in which he found Patricia Swiec and a boy, and he

testified, without any equivocation whatsoever, that the boy in the automobile was one Avery and that the Petitioner was outside the car when they drove up and when he (Markowitz) got out of the car. This testimony being therefore so vitally important to the Petitioner's defense, a summons was issued for the officer. However, he did not appear, and it thereupon was finally agreed that his testimony in the previous case should be admitted into the Record as if it had been delivered in the present case (R. p. 73). But the Court said it did not remember his testifying (R. p. 72) and the prosecuting attorney said he did not recall it in detail and "it would either have to be read back so we could object to specific questions and parts of it—" (R. p. 73). However, the testimony was not read back to the Court by the Reporter and the Court proceeded to enter a verdict of guilty on the fourth count immediately, without familiarizing himself with or having any knowledge of Officer Markowitz's testimony.

The fact that the lower court had pronounced judgment without acquainting itself with the testimony Officer Markowitz had previously given, though it was admitted in evidence (and was afterwards written up and made a part of the Joint Appendix), was brought to the attention of the Court of Appeals on the date of the argument when that part of the Record was added as a supplemental appendix (R. p. 71; App. p. 13) and the question now presented was then argued orally. The Court of Appeals, in its opinion, did not discuss this feature of the case and treated Markowitz's testimony as if it had been considered by the Court below, which was not a fact, for the reasons already given.

Thereupon, the Petitioner filed a motion for reargument and directed the Court's attention to this specific fact again and urged the deprivation of the Petitioner's rights under the due process provisions of the Fourteenth Amendment

of the Constitution of the United States as a ground therefor (R. p. 83; App. p. 21). This motion was denied (without argument) (R. p. 87; App. p. 23).

ARGUMENT

I.

The Criminal Court of Baltimore City deprived the Petitioner of due process when the Court entered up judgment in this case without first having read, or had read to him by the Reporter, the testimony of Officer Markowitz.

The situation is the same as if the Court, sitting as a jury, during the time Officer Markowitz had testified, absented himself from the courtroom, and without having heard his testimony, proceeded to deliver a judgment of conviction. It is inconceivable, especially in a criminal case in which capital punishment could be imposed, that such procedure gratifies the demands of due process. The statement of the fact utterly annihilates this course as our settled concept of a fair trial.

It has been held in many cases that the absence of the presiding judge from the courtroom, during the argument of counsel to the jury, violated due process and vitiated the proceeding.

In the case of People v. Tupper, 122 Cal. 424, 55 P. 125, the defendant was convicted of a felony, and, as a ground for a new trial, he alleged, by affidavit, that during the argument of the case to the jury the Judge absented himself from the courtroom for a period of twenty minutes and throughout that period he was out of sight and hearing of the proceedings that were going on within the courtroom. The Court said:

> "The foregoing facts being undisputed we are fully satisfied they demand a retrial of the case. The argu-

ment of the case to the jury is as much a part of the trial as the introduction of evidence. And evidence may be introduced before the jury in the absence of the judge if the practice here pursued may be held justified within the law. It is hardly necessary to present either argument or authority to show that neither of these practices can be justified. The judge is a component part of the Court. There can be no court without the judge. And all that was done in the absence of the judge was in fact done in the absence of the Court. A defendant convicted under such circumstances has been deprived of his liberty without due process of law. As fully supporting these views we cite O'Brien v. People, 17 Colo. 561, 31 Pac. 230; Turbeville v. State, 56 Miss. 798; State v. Beuerman (Kans. Sup.), 53 Pac. 874."

Palin v. State, 38 Nebr. 862, 57 N. W. 743;
Merdeth v. People, 84 Ill. 479;
Smith v. State, 158 So. (Ala.) 808;
People v. Blackman, 59 Pac. (Cal.) 573;
Stokes v. State, 71 Ark. 125, 71 S. W. 248.

Some of the courts have held, in addition, that the absence of the presiding judge cannot be waived or consented to.

O'Brien v. People, 17 Colo. 561, 31 P. 230;
Thompson v. People, 144 Ill. 378, 32 N. E. 968;
State v. Darrow, 217 N. W. (N. Dak.) 519;
Moore v. State, 46 Ohio App. 433, 188 N. E. 881;
Tunnell v. State, 24 Okla. Cr. 176, 216 P. 951.

In the cases of O'Brien v. People, supra, and Williams v. State (Tex. Cr.), 99 S. W. 1000, the Court absented itself during the examination of a witness, and it was held that this was reversible error.

The instant case, however, presents a situation that is infinitely more serious to the cause of justice than the foregoing cases because the court below, as the trier of the

facts here, has convicted the Petitioner upon evidence admitted into the Record with which it was not familiar or of which it was not cognizant.

II.

The Court of Appeals of Maryland deprived the Petitioner of due process when, in its opinion, the Court failed to consider undisputed facts of great and decisive importance bearing upon the admissibility of the alleged oral confession attributed to the Petitioner.

As the Court has set forth in its opinion, the burden of proof is upon the State to prove the admissibility of the confession; therefore, where the Petitioner has offered testimony which is uncontradicted, it is submitted that the Court of Appeals, in determining its admissibility, cannot consider less than the whole of such testimony. The evidence clearly and indisputably establishes that the Petitioner was assaulted by the father of the prosecutrix (R. p. 18). The evidence (R. pp. 10, 21), further shows that Sgt. Albert Hornstein is the one who was in the car when the threat was made that "they would stick it in me and break it off", and Sgt. Hornstein was not called or offered as a witness by the State, and hence the only conclusion to be drawn is that he was the officer who made the threat. It is axiomatic that the appellant court must consider all the evidence bearing upon the admissibility of the confession and to omit from its consideration undisputed facts would obviously violate the rights of the Petitioner under the Fourteenth Amendment and deprive him of his liberty without due process of law.

The Supreme Court of the United States held, in the cases of Frank v. Mangum, 237 U. S. 309, 35 Sup. Ct. 582, 588, and Cole v. State of Arkansas, 333 U. S. 196, 201, 68 S. Ct.

514, 517, that the proceedings in the appellate court, as well as those in the lower court, are reviewable when the rights of the accused have thus been violated.

In conjunction with the foregoing, and bearing upon the burden of proof resting upon the State, in view of the denial by the Petitioner of Captain Gribben's testimony, the Petitioner urges very strongly the failure of the State to call the two officers (R. pp. 10-11) who were present at the time of the alleged confession and who were in court, to corroborate Captain Gribben (R. p. 12), the only witness who testified to the oral confession, should carry a great deal of weight in determining the admissibility of the confession; in addition to the fact that the Petitioner was harassed by the police officers who conducted a very subtle inquisition, and did not have the benefit of counsel or assistance of near relatives prior to the alleged confession (R. pp. 13-16) when he was told that he was charged with rape, a capital offense (R. p. 15).

The Petitioner contends that in the foregoing circumstances the alleged oral confession was involuntary and should not have been admitted by the lower Court.

The Petitioner's challenge of the treatment of his case by the Court of Appeals of Maryland is not based upon errors committed by the Court in reaching conclusions upon the facts and in applying the law, but rests upon the fundamental failure of the Court of Appeals to consider undisputed and necessary facts which decisively affected the admissibility of the alleged oral confession. To allow the appellate court to omit such evidence from its consideration, would inevitably result in a circumvention of the exactions of due process and utterly destroy the protection the Fourteenth Amendment afforded convicted persons.

CONCLUSION

The Petitioner, therefore, submits that this Court should grant this Petition for a Writ of Certiorari directed to the Court of Appeals of Maryland, and reverse the judgment of said Court in this case, and require the Respondent to pay the costs.

Respectfully submitted,

JOSEPH LOEFFLER,

Attorney for Petitioner.

BERNARD J. FLYNN,

HARRY E. GOERTZ,

Of Counsel.

APPENDIX

SUPPLEMENTAL APPENDIX

(Filed May 25, 1954)

In the Court of Appeals of Maryland

No. 174

Charles Cooper,
Appellant,

vs.

State of Maryland,
Appellee.

That portion of the testimony which is hereinafter referred to as being in the Transcript only, was inadvertently omitted by the Appellant from the Joint Appendix.

(Tr. 108-109):

(Mr. Goertz) Officer Markowitz.

* * * * * *

Thereupon:

(Clerk) Officer Markowitz in court?

(Mr. Goertz) Officer Markowitz. If your Honor please, I issued a summons for him and for him to be here this morning.

(The Court) He doesn't seem to be here.

(Mr. Goertz) Your Honor, for the purpose of the record I am willing for the testimony of Officer Markowitz to be written in the testimony in this case.

(The Court) You mean he testified previously?

(Mr. Goertz) He testified.

(The Court) In another case.

(Mr. Goertz) Yes, in the Krug case yesterday. I am satisfied for his testimony to be written in the testimony in this case at this time. If he comes in I would like to put him on.

(The Court) I don't remember his testifying.

(Mr. Grady) Your Honor, I don't recall it in detail; it would either have to be read back so we could object to specific questions and parts of it—

(Mr. Goertz) He is your witness, you put him on.

(Mr. Grady) I am not going to make a blanket stipulation without knowing what he said in detail.

(Mr. Goertz) Can we have his testimony read back? Read back to us.

(The Court) I will give you an opportunity to produce it later on.

(Mr. Goertz) Maybe he will come in, if Your Honor please.

(The Court) Yes.

(Mr. Goertz) If he comes in I would like to put him on if the State has no objection.

(Mr. Grady) No objection.

(Tr. 122):

(Mr. Goertz) Did Officer Markowitz come in?

(App. 62; Tr. 141A-142):

(Mr. Goertz) We would like to have the testimony of Officer Markowitz. The officer isn't here or if he is he wasn't excluded, was he? If Your Honor please, I am willing to substitute the testimony that was taken yesterday, in this case.

(The Court) Very well.

(Mr. Goertz) I would like to have it in the record though.

(Mr. Grady) If counsel would make some sort of a stipulation we could probably agree to it, but just a blanket thing like this is a little vague and indefinite.

(The Court) The stipulation he offers to make is that Officer Markowitz, if present, would testify exactly as he did in the previous case.

(Mr. Grady) All right, we will agree to that.

(The Court) Very well. Place his testimony in the record.

The Court of Appeals of Maryland

No. 174

October Term, 1953

Charles Cooper

vs.

State of Maryland

Brune, C.J., Delaplaine, Collins, Henderson, Hammond, J.J.

Opinion by Hammond, J.

Filed: June 25, 1954

Charles Cooper, the appellant, was convicted by the Criminal Court of Baltimore, sitting without a jury, of

assault upon a woman child under the age of fourteen, with intent to carnally know her, under the fourth count of a six count indictment which also charged rape and statutory rape. He was found not guilty on all counts but the fourth. He appeals from the judgment and sentence which followed his conviction, relying on the claim that the evidence not only was insufficient to convict but actually shows his innocence, particularly if an oral confession be rejected, as he urges it should have been.

The State proved that the appellant, an eighteen year old boy, regularly employed, picked up five other boys and two girls and started on a ride in his automobile about ten o'clock one July night. After cruising aimlessly for a while, he parked at a place at the foot of Clinton Street on private property referred to as Thompson's. There, all of the riders got out except one William Krug and the prosecuting witness, an eleven year old girl, who stayed on the back seat. The others walked away down the road. After a few minutes, Krug came from the car and told the appellant that the girl wanted to see him, and as he walked towards the car, she called to him. He got in the back seat of the car with her. There are different versions given as to what then ensued. The prosecutrix testifies that she was actually and forcibly raped by the appellant. He testified that he was the innocent and unwilling victim of an assault by the prosecutrix, who committed an act of perversion. The oral confession of the appellant to the police is to the effect that he unsuccessfully attempted to have intercourse with the prosecutrix and then was the willing victim of perversion until his sexual desires were satisfied.

The prosecutrix engaged in sexual activity with a third boy, one Avery (at times called Avaria or Aburn by the witnesses). He was in the car with her when the cruising police car drove up, according to the testimony of Officers Thomas and Markowitz, who said that Krug and Cooper were standing with the other girl near the car. The police asked what was going on, saw nothing wrong and received no complaints from the girls who did not seem scared or disheveled. Therefore, they merely asked for the ages,

names and addresses of the boys and girls (and were told that all were sixteen except Cooper, who was eighteen), and, according to their standing orders, because the place was private property and "a dark and lonely spot", ordered them to leave immediately and not to park there.

The appellant's main claim of error is that the testimony of the prosecutrix was so contradictory, unreasonable, inconsistent and improbable as to be totally unreliable and without probative force, in that she said that Cooper was the boy in the car at the time the police arrived, when, actually, it was said by all other witnesses that the boy then in the car was Avery. It is sought to be shown that the offense for which Cooper was convicted was actually committed by Avery and that the prosecutrix is mistaken in her identity of Cooper, and claims that it was he only because he is the owner of the automobile and the one she sat next to on the drive. Rule 7(c) of the Criminal Rules of Practice and Procedure provides that an appeal from a criminal charge which has been tried by the Court, this Court may review both the law and the evidence to determine whether the evidence is sufficient to sustain the conviction and that the verdict of the trial court shall not be set aside: "* * * unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." The testimony of the prosecuting witness in this case was substantiated, to some extent at least, by the appellant's testimony from the stand — that he was in the car alone with the prosecutrix and that sexual activity was then engaged in. There is no doubt that the time, the place, and the opportunity for the commission of the crime charged was proven. If there be added to the admissions made by the appellant from the witness stand, the confession he gave to the police when he was arrested and charged with the crime, namely, that he had attempted to have intercourse with the prosecutrix, there was ample evidence before the trier of the facts to sustain a conviction of assault with intent to carnally know, if believed. The crime for which the appellant was convicted requires the proving of three elements: first, the

assault, without regard to the degree of violence used; second, the intent to carnally know; and third, that the age of the girl be under fourteen. It is admitted that the prosecutrix was under the age of fourteen, and her testimony and the confession, corroborated by the admission from the stand, provided a basis for finding that the first and second elements were present. We cannot say that the verdict of the trial court was clearly erroneous on the evidence when it decided that there had been assault with intent to carnally know.

We have arrived at this conclusion on the basis that the oral confession, which was objected to, was properly admitted in evidence. The appellant's objections to the confession were three: (a) that it was not free and voluntary; (b) that Captain Gribbin, to whom it was given, made notes of it in his own language; and (c) that it was without corroboration. It was shown that after appellant had let the girls out of the car at the same corner at which he had picked them up, they did not return home but stayed away for some eight days. When the appellant was told by a police officer, who called at his home the next evening, that they were missing, he went to the corner where he had let them out to see if any of the boys knew where they were. While at the corner, the father of the prosecutrix and two other men insisted that he go to the Eastern Police Station with them, which he did. On arrival, he was questioned by two officers, who indicated that they did not believe that he did not know the whereabouts of the girls, and, according to the accused, told him that if he did not tell the whole truth, they would make it hard on him. The next day, two policemen came to his house, telling him that the girls were still missing and that they did not believe his story. The day following that, two other police officers asked him to sit with them in the car across the street from his home to discuss the matter and, according to the appellant, one of them told him if he wasn't telling everything: "* * * they would stick it in me and break it off." It was some two weeks after this last incident that appellant was arrested and taken to the police station, where, in Captain Gribbin's office, he gave the confession.

The burden is upon the State to show to the satisfaction of the court that a confession was a free and voluntary one, that no force or coercion was exercised to obtain it, and that no hope or promise was held out as an inducement to the giving. *Glover v. State*, 202 Md. 522, 525. Each of the officers who went to arrest the appellant and each who was present in the Captain's room when the confession was made, testified that no force was used, no threats were made and no inducements promised. Captain Gribbin so testified specifically. The appellant himself does not claim that he was subjected to physical or mental duress or that he was threatened or offered any inducement to make the statement at the time it was given. The interview lasted for ten or twelve minutes in a room with the door open. We find nothing in the record to justify a conclusion that the trial court was wrong in finding that the confession was free and voluntary and properly admissible. The effort of the appellant to invalidate it because he had been scared by the visits of the police two weeks before, must fail. It is not charged that the fear continued in the two week interval or that fear prompted the confession when it was made. The police officers, who were accused by the appellant of telling him that: "* * * they would stick it in him and break it off" flatly denied making such a statement. We are not unmindful of the principle underlying the rule that when a confession is found to be involuntary and inadmissible, a presumption exists that a subsequent confession was made by reason of the influence which produced the first, and before the second can be introduced, this presumption must be overcome by clear and convincing evidence; *Edwards v. State*, 194 Md. 387, 400, but that is not this case. At the time he claims to have been afraid, the appellant not only made no confession or admission, but denied all knowledge of the whereabouts of the girls or of any untoward action in regard to them. If the appellant was afraid, as he claims, his fear was insufficient to induce him to confess when the whole truth was demanded and, as has been said, he does not even claim that it existed at the time that he did confess, or that it then induced him to do so.

The appellant's contention that the confession should not be admitted because it was not taken down verbatim does not help him. Captain Gribbin made notes of the statements which the boy made during the twelve to fifteen minute interview, and an hour or so later, wrote them up and had them typewriten. At the trial, appellant's counsel agreed that he might use the typewritten notes to refresh his recollection. The Captain testified that the heart of the confession was in the exact words of the accused, except that he had paraphrased certain later portions to avoid extreme vulgarity, and expressed willingness, if requested, to repeat precisely the vulgar language the boy used. The appellant's counsel did not accept this invitation. On cross-examination, the Captain asserted firmly that he had not embroidered or elaborated on what was confessed in any way. The appellant urges us to conclude from the testimony that the Captain's notes represent his interpretation of what appellant said, rather than what he actually said. We do not so read the record. We think the Captain testified, and the court properly could have found, as it did, that the substance of what the accused said was put down almost verbatim, and, in any event, without material omission and without elaboration. This is sufficient for the admission of an otherwise acceptable oral confession. *Edwards v. State*, 198 Md. 132, 146.

The final objection to the confession is entirely without merit. As has been shown, the *corpus delicti* was proven by the prosecuting witness and by the testimony of the appellant from the stand. This being so, the confession was not without corroboration, as appellant claims.

Judgment Affirmed, With Costs.

MOTION FOR REARGUMENT

(Filed July 24, 1954)

In the Court of Appeals of Maryland

No. 174

Charles Cooper,

Appellant,

vs.

State of Maryland,

Appellee.

The Appellant, Charles Cooper, by Bernard J. Flynn, Harry E. Goertz and Joseph Loeffler, his attorneys, moves that reargument in the above entitled case be granted for the following reasons:

1. That the Appellant has been denied the guarantees of due process granted by the Fourteenth Amendment of the Constitution of the United States.

A. Because this Court, in its opinion, has failed to consider undisputed facts of great and decisive importance bearing upon the admissibility of the alleged oral confession by the Appellant.

B. Because this Court has failed to pass upon the effect of the action of the Presiding Judge in the lower Court in entering judgment in this case without first having read, or had read to him by the Reporter, the testimony of Officer Markowitz.

A.

Because this Court, in its opinion, has failed to consider undisputed facts of great and decisive importance bearing upon the admissibility of the alleged oral confession by the Appellant.

As the Court has set forth in its opinion, the burden of proof is upon the State to prove the admissibility of the confession; therefore, where the Appellant has offered testimony which is uncontradicted, it is submitted that this Court in determining its admissibility cannot consider less than the whole of such testimony. The evidence clearly and indisputably establishes that the Appellant was assaulted by the father of the prosecutrix (App. 15). The evidence (App. 7, 18) further shows that Sgt. Albert Hornstein is the one who was in the car when the threat was made that "they would stick it in me and break it off", and that Sgt. Hornstein was not called or offered as a witness by the State, and hence the only conclusion to be drawn is that he was the officer who made the threat. It is axiomatic that the appellate court must consider all the evidence bearing upon the admissibility of the confession and to omit from its consideration undisputed facts would obviously violate the rights of the Appellant under the Fourteenth Amendment and deprive him of his liberty without due process of law.

In conjunction with the foregoing and bearing upon the burden of proof resting upon the State, in view of the denial by the Appellant of Captain Gribben's testimony, the Appellant urges very strongly the failure of the State to call the two officers who were present at the time of the alleged confession, and who were in Court, to corroborate Captain Gribben, should carry a great deal of weight in determining the admissibility of the confession.

The Supreme Court of the United States held, in the case of Frank v. Mangum, 237 U. S. 309, 35 Sup. Ct. Rep. 582, 588, that the proceedings in the appellate court, as well as those in the lower court, are reviewable when the right of the accused have been thus violated.

B.

Because this Court has failed to pass upon the effect of the action of the presiding Judge in the lower Court to enter judgment in this case without first having read, or had read to him by the Reporter, the testimony of Officer Markowitz.

Prior to the argument on May 25, 1954, counsel for the Appellant (Harry E. Goertz), presented to the Court copies of a portion of the testimony, which appeared in the transcript, but was inadvertently omitted by the Appellant from the Joint Appendix and, for convenient reference, that part of the transcript is quoted below (Supplemental Appendix, supra, pp. 13-15).

It is obvious from the foregoing that the presiding Judge had no recollection whatsoever, from what he said, of the testimony that had been given in a prior case by Officer Markowitz and which he had ordered included in the Record. It is inconceivable, therefore, how the Court could enter a verdict in the case without having heard or read all the testimony bearing upon the guilt or innocence of the Appellant and such procedure certainly does not comport with our conception of the commands of the due process clause as laid down by the decisions of the courts in similar situations.

People v. Tupper, 55 P. 125, 122 Calif. 424;
O'Brien v. People, 31 P. 230, 17 Colo. 561;
State v. Beuerman, 53 P. 874 (Kans.).

BERNARD J. FLYNN,
HARRY E. GOERTZ,
JOSEPH LOEFFLER,
Attorneys for Appellant.

July 26, 1954 — Motion denied.

FREDERICK W. BRUNE,
Chief Judge.

DOCKET ENTRIES

Court of Appeals of Maryland

No. 174

October Term, 1953

Charles Cooper

vs.

State of Maryland

Appeal from the Criminal Court of Baltimore

(Filed: March 30, 1954)

May 25, 1954 — Supplemental Appendix filed.

June 25, 1954 — Judgment affirmed, with costs. Opinion filed. OP. Hammond, J.

July 24, 1954 — Motion for Reargument filed.

July 24, 1954 — Petition to Stay Mandate filed.

July 26, 1954 — Motion for Reargument denied.

July 26, 1954 — Petition to Stay Mandate granted.

August 24, 1954 — Petition and Order to Stay Mandate until decision of U. S. Supreme Court on Writ of Certiorari filed and granted.

NOV 8 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 362

CHARLES COOPER,

Petitioner,

vs.

STATE OF MARYLAND,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

EDWARD D. E. ROLLINS,
Attorney General,
W. GILES PARKER,
Assistant Attorney General,
Attorneys for Respondent.

The Daily Record Co., Baltimore 3, Md.

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CHARLES COOPER,

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

STATEMENT OF THE CASE

This is a petition for a writ of certiorari to the Court of Appeals of Maryland. Petitioner was tried under an indictment filed August 14, 1953 with the Criminal Court of Baltimore City and containing six counts, all arising from the same set of facts. Petitioner was tried before a Judge without a jury in the Criminal Court of Baltimore City and found guilty under the fourth count only. This count, which appears in the record, involved the crime of assault with intent to commit carnal knowledge. Upon an appeal to the Court of Appeals of Maryland, the conviction was affirmed, the opinion of the court appearing in Petitioner's

Brief, beginning at page 15, and has been reported in 106 A. 2d 129. Petitioner has now applied for the writ of certiorari to this Court.

QUESTIONS PRESENTED

Whether the Petitioner was Denied Due Process of Law Upon Petitioner's Allegation that the Judge in the Nisi Prius Court Failed to Have Read to Him or to Read Certain Testimony Which was Entered in the Record by Stipulation.

II.

Whether the Petitioner's Rights to Due Process Were Violated by the Admission into Evidence of the Testimony of a Police Officer as to a Confession Made Orally by Petitioner.

(It is to be noted that the first question presented by Petitioner in his Brief, as stated above, was not raised or considered in his Brief in the Court of Appeals of Maryland.)

STATEMENT OF THE FACTS

The salient facts of this case in condensed form are that Charles Cooper, while in the back seat of an automobile with one Patricia Swiec in the City of Baltimore, on the night of July 20, 1953, engaged in certain activities described by Patricia Swiec and, in at least some degree, admitted by Cooper in his testimony during the trial of the case, and further by a confession made to a police officer shortly after his arrest. It is undisputed that Patricia Swiec was eleven years old at the time. The Maryland statute relating to carnal knowledge prohibits the same with any "female child under the age of fourteen years". There is considerable difference between various witnesses as to minor details, which appears in the record, contained

mainly in the Joint Appendix filed with this Honorable Court in the same form in which that Appendix was filed with the Court of Appeals of Maryland.

ARGUMENT

I.

Whether the Petitioner was Denied Due Process of Law Upon Petitioner's Allegation that the Judge in the Nisi Prius Court Failed to Havc Read to Him or to Read Certain Testimony Which was Entered in the Record by Stipulation.

As to the first question involved as stated by Petitioner, the Record indicates that the testimony of one Officer Markowitz is included in full in the Record which was before the nisi prius court and also before the Court of Appeals of Maryland, appearing at page 63 of the Appendix. This particular case, it is to be noted, was one of a series of cases involving offenses with the same young girl by several men, and on the day previous to the trial of Cooper, another man, by the name of Krug, had been convicted, and Officer Edward Markowitz had testified in that trial. Markowitz, for some reason, did not appear at the Cooper trial and his testimony, given the day before in the same court and to the same Judge, was admitted in evidence by stipulation and agreement of counsel. There is nothing in the Record to indicate that the Judge was not fully aware of the entire contents of this testimony which, while it differed in some respects from the testimony of other witnesses, could in no wise be considered as controlling or of great relevancy to the fundamental facts of the case. The Petitioner, in his Brief, makes much of the fact that the Court of Appeals of Maryland did not mention this particular testimony in its opinion. It is respectfully submitted that, were an appeal to lie from every decision

in which the opinion of the court did not mention every fact in the record, the appellate courts would be burdened with the necessity of reprinting the entire record in each case in the opinion, which would, of course, be impossible. The presumption must be that an appellate court, in writing its opinion, has considered all facts to be found in the record, whether argued by counsel or not, and the same presumption applies to the action taken by a judge of a nisi prius court, sitting as a jury, and there is nothing in the record in this case to indicate that any of the evidence in this case was not considered by both courts who have determined the guilt of the Petitioner.

There was a plethora of evidence sufficient to sustain the conviction in the court below, although it was strenuously argued before the Court of Appeals of Maryland that there was not sufficient evidence to sustain conviction in the court below. The opinion of the Court of Appeals of Maryland indicates beyond doubt that there was more than sufficient evidence to sustain Cooper's conviction. Despite the Petitioner's argument on his first point, there is nothing in the case to indicate that the presiding judge left the court room at any time during the presentation of evidence, or failed to consider all of the evidence that had been presented, and it is respectfully submitted that the Petitioner has ascended into the realm of fancy in trying to twist the facts of the case to fit the law cited by him. None of the cases which he has cited are applicable to the facts of the instant case.

The elements of the crime for which Cooper was convicted, namely, assault with attempt to commit carnal knowledge, involve the necessity for and, of course, place the burden on the State to prove, first, an assault (without regard to the degree of violence used); second, the intent

to carnally know; and third, that the age of the girl was under fourteen years. In the case at bar, Patricia Swiec's age is admitted. There can be no doubt that the time, the place and the opportunity for the commission of the crime were as presented by the State. Patricia Swiec herself testified that she was actually and forcibly assaulted (App. 30-46), and the Appellant Cooper himself admitted to Captain Gribbin of the Police Department that he had acted in a manner which obviously constituted an assault (App. 23), although he did not admit that the assault had proceeded to the degree testified to by the Swiec girl. Cooper himself, while testifying in this case, admitted that he was in the automobile at the time and place and with the opportunity, but, as may be noted (App. 57), tried to convince the Court of Appeals that he himself was the victim of an assault and was only saved by circumstances from being raped by the little girl.

It is respectfully urged that the testimony of the complaining witness alone would be sufficient, but coupled with the admissions of the Petitioner should be conclusive on the question as to the sufficiency of the evidence to sustain the conviction, and whether or not any other evidence in the case was to be considered was a matter for the sound discretion and decision of the trial judge sitting as a jury.

II.

Whether the Petitioner's Rights to Due Process Were Violated by the Admission into Evidence of the Testimony of a Police Officer as to a Confession Made Orally by Petitioner.

Petitioner maintains that testimony as to an alleged oral confession of the Petitioner should not have been admitted because of his allegation that the Court of Appeals "failed

to consider undisputed facts of great and decisive importance bearing upon the admissibility of the alleged oral confession".

It is respectfully urged that the testimony as set out in full in the Appendix, particularly that of Sgt. George Eber (App. p. 6), Officer Elmer Weber (App. p. 7), Officer George Shearer (App. p. 7), Lt. Vinup (App. p. 8), Capt. Gribbin (App. p. 9), and, for that matter, of the Petitioner, Charles Cooper, himself (App. pp. 19 and 20), shows without even a scintilla of contradiction that there was no force or coercion after his arrest and prior to the time he made the various statements to Captain Gribbin and, as a matter of fact, there was no force or coercion used upon him at any time, and the sole basis of his argument appears to be that, because he had been upset by the fact that the police were questioning him in connection with their investigation of a missing person, this should, for some reason which we are unable to understand, make his statement as to his participation in the acts constituting the crime inadmissible in evidence. Petitioner has cited authority to indicate that the burden of proof is to show affirmatively that a confession was freely and voluntarily made and not obtained by any improper inducement. This is, of course, completely true, but in the case at bar, there is no evidence whatsoever that any improper inducements were offered or any threats or coercion used in any way, all the testimony being unanimous to the effect that at no time were any threats, promises or offers of reward or immunity made to Cooper; nor was any force or violence used upon him. Furthermore, the language quoted by Petitioner, himself, on page 14 of his Brief, before the Court of Appeals taken from *Thomas v. State,* 186 Md. 446, namely:

> "As there is no precise formula by which to determine whether a confession is voluntary, the determina-

> tion of the question lies within the sound discretion of the trial judge. The determination of the question by the trial judge will not be disturbed by the Court of Appeals, unless the discretion has been clearly abused."

This states exactly the proposition of the Respondent in this case, and a thorough study of the record has been completely unproductive of any evidence whatsoever that the discretion of the trial court had been clearly abused in the case at bar.

The argument advanced by Petitioner in objecting to the testimony of Captain Gribbin because it was from notes made in his own words, rather than in the exact language of the Petitioner, will not stand up, because no written confession or purported statement as actually made by the Petitioner was admitted into evidence but Captain Gribbin was permitted to use certain notes which he had made after the time of questioning during his testimony (App. pp. 22 and 23), and it is particularly to be noted that counsel for the Petitioner withdrew his objection to the use of the typewritten notes by the Captain while testifying, and Captain Gribbin, himself, admitted that certain statements made to him by Cooper were paraphrased by him, rather than to use the exact "vulgar expressions" which Cooper had used to him.

A similar question was considered by the court in the case of *Chisley v. State*, 95 A. 2d 577, which was even stronger than the point raised in the case at bar, because, in the Chisley case, the actual written confession, itself, was admitted into evidence properly, even though it did not contain the literal, exact words possibly used by the defendant at the time of giving the statement. The notes used by Captain Gribbin in his testimony do not even ap-

pear in evidence or in the Record, and we have no way of knowing exactly what words were used in those notes. All we have in the Record in this case is Captain Gribbin's testimony on the witness stand of what was said to him by Cooper, and there is no rule of law that requires that such testimony must be an exact, literal reproduction of the exact words used by the confessor. Wharton, Criminal Evidence, 11th Ed. Sec. 582:

> "* * * Furthermore, it will not avail the defendant to object that the written confession does not contain a literal, exact transcription of what he said. It is sufficient that the confession is contained in substance. Similarly, it is not a valid objection to the admissibility of a written confession that it does not contain all that the confessor said."

In the case of *Preston v. United States*, 80 Fed. 2d 702, the objection was made that the police "were careless in taking down appellant's answers to the questions asked him, and that the answers were not correctly transcribed". The Court there held:

> "* * * There is, however, no charge that appellant made the statement in consequence of inducements of a temporal nature, held out by the police, or because of a threat or promise by or in the presence of the police, which, operating upon his fears or hopes, deprived him of that freedom of will or self-control essential to make his confession voluntary within the meaning of the law. * * * In these circumstances it is perfectly clear that the confession was the voluntary act of accused wholly free from extraneous influences of any character and in the circumstances narrated *it is equally clear that the objection went not to the admissibility of the confession, but alone to its weight; and that question was solely for the jury*". (Emphasis supplied.)

An examination of Captain Gribbin's testimony will indicate (App. pp. 21-25, inclusive) that the statement made by Cooper was short, to the point, and certainly not distorted by any attempt of the Captain to add or substract.

Petitioner's argument that there was no corroboration of Captain Gribbin's testimony is ridiculous, in view of the testimony of Patricia Swiec, and as pointed out above, the only difference in the essential elements relates to the degree to which the assault had progressed. Neither her testimony, nor his admission, nor any of the other testimony in the case negatives the fact that there was an assault with improper sexual relations as the object of the assault. The authority cited by Petitioner is good authority for the rule that no person should be convicted of a crime solely upon his own confession without other evidence, but that rule is not applicable to the facts of the case at bar.

CONCLUSION

It is respectfully submitted for the reasons stated herein that the Petitioner has been denied no right under the Constitution of the United States, and that the Petition should, therefore, be denied.

Respectfully submitted,

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Attorney General,

W. GILES PARKER,
Assistant Attorney General,
Attorneys for Respondent.